

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 5908/2018

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

SIBUSISO PRESLEY NDLOVU

Applicant

And

THE MINISTER OF POLICE

Respondent

HEARD ON: 26 MAY 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 17 August 2022.

[1] On 23 November 2018 the applicant issued summons against the respondent for payment of an amount of R500 000.00 as damages he allegedly sustained as a

result of being unlawfully arrested on 7 May 2017 and thereafter detained for a month.

[2] The applicant's summons was preceded by a written notice of intention to sue ("the notice") as contemplated in section 3 of the Institution of Legal Proceedings against Certain Organs of State Act¹ ("The Act").

[3] The respondent defended the action and in addition to the plea, the respondent raised a special plea objecting to the applicant's non-compliance with the provisions of section 3(2)(a) of the Act contending that the applicant's notice was not served within six months from the date the debt became due as prescribed in section 3(2)(a).

[4] Section 3(1) (a) and 3(2) (a) of the Act clearly states that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question a written notice of his/her intention to sue it within six months from the date the debt became due.

[5] The underlying principle for the requirement of prior notification of intention to sue is premised on the recognition that: *"with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them."*²

[6] Except for the disputed date of arrest,³ it is common cause that the requisite notice was only served on the respondent on 31 August 2018 well over a period of about 12 months after the date on which the applicant alleges the debt became due namely, 7 May 2017.

[7] In this application the applicant seeks a declaratory order that he has complied with the requirements of section 3(2) (a) in the alternative, he seeks condonation for his non-compliance.

¹ Act 40 of 2002.

² *Minister of Agriculture and Land Affairs v CJ Rance (PTY) LTD* **2010 (4) SA 109** (SCA) at para 13.

³ According to the respondent, the applicant was arrested on 7 June 2017.

[8] The applicant's assertion that he has complied with the provisions of the Act is unsound. On the facts germane to this matter it is clear that the notice was not served within the six months' period prescribed by section 3(2) (a).

[9] In terms of section 3(4)(b) the court has a discretion to condone non-compliance in respect of the delivery of the notice if the applicant satisfies the court that the debt which forms the basis of his claim has not been extinguished by prescription, good cause exists for the failure to serve the notice timeously and the respondent was not unreasonably prejudiced by the failure.

[10] It has been pointed out in *Madinda v Minister of Safety and Security*⁴ that the phrase "*if the court is satisfied*" does not require proof on a balance of probabilities "*rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties.*"

[11] In this matter, it is not in dispute that the applicant's claim has not prescribed therefore for the applicant to succeed with this application, he must simply show that good cause exists for the failure to serve the notice timeously and that the respondent was not unreasonably prejudiced by the late notice.

[12] Good cause involves "*all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. These factors may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.*" See *Madinda* at para 10.

[13] These factors are not individually decisive but interrelated in that, they must be weighed one against the other. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong or, strong merits may mitigate fault.⁵

⁴ **2008 (4) SA 312** (SCA) at para 8.

⁵ *United Plant Hire (Pty) Ltd v Hills and others* **1976 (1) SA 717 (A)** page 720 para E-G quoted with approval in

[14] In his founding affidavit, the applicant alludes to various factors which he contends caused the delay in serving the notice namely that: he only became aware of his right to claim damages against the respondent after he was informed by his erstwhile attorney Mr Mofokeng during March 2018. Mr Mofokeng referred him to his present attorneys Messrs Herman Podbielski and Sam Maqalo however, he only consulted with Mr Maqalo on 6 August 2018 due to lack of financial means to appoint an attorney. He states that since the case was merely withdrawn he decided to wait and see whether the charges will be reinstated or not before instituting the action. After consulting Mr Maqalo, he (Mr Maqalo) had to investigate the merits of the claim before instituting the action with the result that the notice was only transmitted to the respondent on 31 August 2018. The delay in launching the condonation application was occasioned by the lockdown imposed pursuant to the National State of Disaster to curb the spread of Covid-19 which caused his attorneys to operate with a limited number of staff, inability to access emails and to consult with clients.

[15] It is the applicant's case that he has good merits as no reasonable grounds existed warranting his arrest and detention.

[16] The application is opposed on the grounds that the applicant has failed to provide sufficient reasons for the delay in serving the notice and also in launching this application.

[17] The respondent states that except to allege that he was informed by his previous attorney about his claim he does not provide the context of that conversation. The applicant states that it was only in August 2018 that he consulted with his attorney for the first time and this was due to financial constraints but he does not provide any details with regard to the specific time when he experienced the alleged financial constraints and if indeed this is true, there is no explanation why he did not utilise the services of the Legal Aid Board or even approach the Legal Practice Council's pro-bono desk. The applicant was legally represented throughout the criminal proceedings which are subject of his claim therefore, his attorney ought to have advised him accordingly.

[18] The respondent submits that the applicant has no prospects of success with his claim as the arrest was lawful as it was effected by Constable Machesa (“the arresting officer”) on 7 June 2017 at Welkom court where the applicant was appearing on an unrelated charge. The applicant was implicated by his co-perpetrators and also identified on the premises’ CCTV camera footage as one of the robbers of a guest house. The subsequent detention was also lawful as it was authorized by the court pending his application for bail. The applicant was ultimately released on bail on 28 July 2017 where-after the charges proffered against him were withdrawn.

[19] It is trite that good cause in section 3(4)(b)(ii) is linked to the failure to act timeously. The subsequent delays in bringing the condonation application do not factor in the enquiry of good cause as they did not contribute to the delay in serving the notice. They are ‘part of the exercise of the discretion to condone’ the late notice.⁶

[20] With regard to the delay in serving the notice, I’m in agreement with the respondent’s contentions that the delay in serving the notice is extreme while there is a paucity of the details pertaining to the ineptitude. On his own admission the applicant was advised of his rights to institute a claim against the respondent some 15 months before the notice was served on the respondent. Instead of consulting the recommended attorneys he decided to wait and see if the charges would be reinstated or not. The applicant’s conduct in this regard is irrational. Lack of financial means to consult an attorney is indeed a valid explanation however, as correctly pointed out by the respondent’s counsel there is no explanation why the applicant did not consult the offices of Legal Aid for assistance if indeed he was desirous in progressing his claim against the respondent. His submission that Mr Maqalo had to first investigate the merits of the claim before instituting the claim is illogical considering the fact that on his own submission Mr Mofokeng had already told him over 15 months ago that he had a claim against the respondent. The applicant’s explanation of default and how it came about is wholly inadequate.

⁶ Madinda at paragraph 14.

[21] The fact that the applicant has failed to explain fully and reasonably the delay in serving the notice, on its own does not entitle the court to summarily refuse condonation. The prospects of success in the proposed action is also a factor that the court takes into account as strong merits may mitigate fault.⁷

[22] The respondent's version with regard to the reason and the circumstances under which the applicant was arrested is not disputed. Except to fleetingly aver that the arrest and the detention was unlawful the applicant has inexplicably avoided to provide the details which precipitated his arrest. See paragraphs 5 and 6 of his founding affidavit and the particulars of claim, respectively.

[23] An arrest is *prima facie* unlawful⁸ the onus rests on the respondent to justify the arrest. Section 40(1) (b) of the Criminal Procedure Act 51 of 1977 ("The CPA") permits a peace officer to arrest a suspect without a warrant whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act.⁹ Schedule 1 offences include robbery. Concerning the issue of whether the arresting officer entertained a reasonable suspicion when arresting the applicant, the information available to the arresting officer at the time that he makes an arrest is interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion. There must be evidence upon which the arresting officer formed this suspicion, in other words, the arresting officer must also carry out some investigations into the essential elements of the offence complained about in order to qualify the suspicion as reasonable.

[24] On the available facts, except to aver that the applicant was implicated by his co-perpetrators and also identified from the CCTV camera footage of the business premises there is no evidence that there were some investigations that were carried out to qualify the suspicion as reasonable to warrant the arrest bearing in mind that at all material times hereto the applicant was in custody therefore his whereabouts were known. The arresting officer had ample time to conduct his investigations before effecting the arrest. I'm thus of the view that *prima facie*, the applicant has set

⁷ Ibid fn 5 above.

⁸ Section 12(a) of the Constitution of the Republic of South Africa Act No 108 of 1996.

⁹ Minister of Safety and Security v Tyulu 2009 (2) SACR 282 (SCA).

up a case upon which the respondent's liability can be imputed. There are good prospects of success.

[25] With regard to prejudice, it is the applicant's case that the respondent is not prejudiced by the late notice because it has always been in possession of the case docket which contains all the relevant evidence and the facts relating to the applicant's arrest. The respondent was also served with the notice albeit late.

[26] The respondent countered that prejudice arises from the finances and human capital of the State to defend a meritless action when the resources could be utilized somewhere else. The alleged cause of action arose about four years ago, then the claim was delayed for more than two and a half years. The delay in bringing the condonation application amounts to serious prejudice as memories of the witnesses may have faded, other witnesses might be difficult to find or may be deceased. It is also uncertain whether the respondent will be able to recover its costs in the event that this application is dismissed with costs.

[27] The grounds of prejudice for receiving the notice out of time are ordinarily within the knowledge of the respondent. The respondent's contentions are simply based on speculative grounds namely that: the memories of the witnesses may have faded, other witnesses might be difficult to trace or they may be dead. There is no evidence that an attempt was made to trace the witnesses and what was the outcome. Based on these generic averments, it cannot be said that the respondent was unreasonably prejudiced by the late notice.

[28] In the circumstances, I'm satisfied that a proper case has been made out for condonation of the late filing of the notice in terms of section 3.

Costs

[29] The applicant sought the court's indulgence, there is no reason why he should not be saddled with the costs taking into consideration the inordinate and unexplained delay. The opposition of the application was not unreasonable.

[30] The following order is made:

(1) Condonation is granted to the applicant for the late service of the notice in terms of **s 3(1) (a)** of the **Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.**

(2) The applicant to pay the costs of the application.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Adv. E.G. Lubbe

Instructed by:

VZLR INC.

C/O Du Plooy Attorneys

BLOEMFONTEIN

Counsel on behalf of the Respondent:

Adv. T.T. Ngubeni

Instructed by:

The State Attorney

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